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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1094

WILLIAM G. BARNES,

Petitioner,

vs.

CITY OF PHILADELPHIA

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF THE STATE OF PENN-
SYLVANIA AND BRIEF IN SUPPORT THEREOF.**

THOMAS D. McBRIDE,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1094

WILLIAM G. BARNES,

vs.

Petitioner,

CITY OF PHILADELPHIA

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petitioner, William G. Barnes, by his attorney, Thomas D. McBride, respectfully presents to this Court his petition and prays that a writ of certiorari issue under the authority of judicial Code sec. 237b, 43 Stat. 937, 28 U. S. C. A. 344b, to review the Judgment of the Superior Court of Pennsylvania as of No. 156, October Term, 1945, affirming a judgment of the Court of Common Pleas No. 2 of Philadelphia County, Pennsylvania, as of No. 993, December Term, 1944. The Judgment of the Superior

Court of Pennsylvania, which is an intermediate Court of Appeal, was entered on November 19, 1945. Petitioner duly invoked the discretionary jurisdiction of the Supreme Court of Pennsylvania, which is the highest Court of that State, by presenting his petition for allowance of an appeal on November 28, 1945. The Supreme Court of Pennsylvania refused to allow an appeal, without Opinion, on January 11, 1946. This petition is filed herein on the 10th day of April, 1946.

The Opinion of the Superior Court of Pennsylvania is printed in the Record, p. 133 *et seq.* It is reported in 158 Pa. Super. 179, 44 A. 2d 610.

Statement of the Case

1. Your petitioner, William G. Barnes, is a resident of the State of New Jersey who has been for some years past an employe of the United States Government at the Navy Yard situate at League Island adjacent to the City of Philadelphia. In going to and from his work he does not pass through the city proper.

2. The City Council of the City of Philadelphia, on December 13, 1939, by Ordinance, imposed a tax on salaries, wages, commissions and other compensation for work done or services performed in that City. The entire Ordinance appears in the Appendix hereto, p. 26. The relevant provisions thereof are as follows:

Section 2, imposes an annual tax for general revenue purposes "on (a) salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia; and on (b) salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia; * * *

Section 3, provides that "Each person whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 15th of each year, make and file with the Receiver of Taxes a return on a form furnished by or obtainable from the Receiver of Taxes, setting forth the aggregate amount of salaries, wages, commissions and other compensation or net profits earned by him during the preceding year and subject to the said tax, together with such other pertinent information as the Receiver of Taxes may require; * * *"

Section 9, provides that "Any person who shall fail, neglect or refuse to make any return required by this ordinance, or any taxpayer who shall fail, neglect or refuse to pay the tax, penalties and interest imposed by this ordinance, or any person who shall refuse to permit the Receiver of Taxes or any agent or employee appointed by him in writing to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits to avoid the payment of the whole or any part of the tax, shall be subject to a fine or penalty of one hundred (100) dollars and costs for each such offense, or to undergo imprisonment for not more than thirty days for the non-payment of such fine or penalty and costs within ten days from the imposition thereof.

Such fine or penalty shall be in addition to any other penalty imposed by any other section of this ordinance.

The failure of any employer or any taxpayer to receive or procure a return form shall not excuse him from making a return."

Section 10, provides that "This ordinance shall not apply to any person or property as to whom or which it is

beyond the legal power of Council to impose the tax or duties herein provided for."

3. After the passage of the Ordinance the City did not attempt to apply it to non-resident Federal employees performing services in Federal reservations, title to which is in the Federal Government, until the year 1941.

4. Public Act No. 819, sec. 2, 54 Stat. 1060, 4 U. S. C. A. 14, enacted by the Congress of the United States on October 9, 1940, reads as follows:

"(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940."

5. Your petitioner failed to file a return with the Receiver of Taxes of the City of Philadelphia on or before March 15, 1943, for compensation received by him during the year 1942, as an employee of the United States Government at the Navy Yard situate at League Island. He likewise failed, on or before March 15, 1944, to file a similar report for the year 1943. The City of Philadelphia then brought an action of assumpsit in the Court of Common Pleas No. 2 of Philadelphia County, as of December Term, 1944, No. 993, against your petitioner. The City did not sue for the taxes alleged to be due but for the fine of \$100.00 for each year for

failure to file a return as provided in Section 9 of the Ordinance. That was the issue submitted to the jury (R. 116a-117a).

6. The case was tried to a court and jury which returned a verdict for the City for the total penal sum of \$200.00. Petitioner duly filed a motion for new trial and for judgment *non obstante veredicto* which were dismissed by the court of Common Pleas in an Opinion by the Trial Judge (R. 133a-137a). Judgment against petitioner was entered on the verdict.

7. An appeal from the said judgment was duly taken to the Superior Court of Pennsylvania. In that Court petitioner contended that the Ordinance was invalid as applied to him as a resident of New Jersey, on the grounds:

(a) that it constituted a taking of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (Thirteenth Assignment of Error, R. p. 144);

(b) that it abridges the privileges and immunities of the petitioner as a citizen of the United States, in violation of the Fourteenth Amendment of the Constitution of the United States (Fourteenth Assignment of Error, R. p. 144);

(c) that Section 2 of the Act of Congress of October 9, 1940, 54 Stat. 1059, 4 U. S. C. A. 14, as interpreted by the Supreme Court of Pennsylvania and as applied by the Superior Court of Pennsylvania to petitioner, deprives him of due process of law in violation of the Fifth Amendment to the Constitution of the United States (Fifteenth Assignment of Error, R. p. 145);

(d) that it abridges the privileges and immunities of appellant as a citizen of the United States in violation of

the Fifth Amendment to the Constitution of the United States (Eighteenth Assignment of Error, R. p. 145);

(e) the penal provision of the Ordinance is invalid because it is beyond the police power of the City in that League Island Navy Yard is within the exclusive control, for penal purposes, of the Federal Government.

In the trial court there were eight cases tried together. In the printed record sent to this Court all writs, motions, rules, pleadings, testimony and opinions applied equally to each of the eight appeals although petitioner alone is proceeding in this Court. That explains why some of the papers use the name of one of the other litigants rather than printing eight separate sets of papers.

Although in the seven companion cases certain objections to trial rulings were sustained by the Superior Court of Pennsylvania, your petitioner specifically withdrew all such objections so that his case could be presented ultimately to this Court.

8. The Superior Court of Pennsylvania on November 19, 1945, affirmed the judgment of the Court of Common Pleas. The Opinion of that Court is printed in the Record, p. 133 et seq. As noted above, the Supreme Court of Pennsylvania, having a discretionary right of review, refused an appeal.

Questions Presented

9. Whether the Ordinance of the City of Philadelphia can be applied constitutionally to petitioner, a non-resident of the City of Philadelphia or of the State of Pennsylvania, who works in the League Island Navy Yard, over which the United States Government has exclusive jurisdiction.

10. Whether Section 2 of the Act of Congress of October 9, 1940, c. 787, 54 Stat. 1060, 4 U. S. C. A. 14, authorizes the

City of Philadelphia to tax petitioner on the basis of income derived by him for work performed at the League Island Navy Yard which is under the exclusive jurisdiction of the United States Government, petitioner not being a resident of the City of Philadelphia or of the State of Pennsylvania.

11. Whether, in view of the exclusive jurisdiction of the United States over League Island Navy Yard, the City of Philadelphia has such police power as will warrant the creation and punishment of penal offenses committed therein.

Reasons Relied Upon for Allowance of Writ

12. In the Superior Court of Pennsylvania petitioner questioned the validity of a statute of the State of Pennsylvania, to wit, the Ordinance of the City of Philadelphia, on the ground that, as applied to him, it is repugnant to the Constitution of the United States. The decision of the said Superior Court of Pennsylvania was in favor of the validity of such statute, thus entitling petitioner to invoke the obligatory jurisdiction of this Court by Appeal. Petitioner has sought review by certiorari owing to indecision as to whether an Appeal should be applied for in the first instance to the Chief Justice of the Supreme Court of Pennsylvania or the President Judge of the Superior Court of Pennsylvania. Petitioner respectfully submits, however, the present petition should be granted because substantively his right to review seems clear.

13. The decision of the Superior Court of Pennsylvania is based upon the decision of the Supreme Court of Pennsylvania in *Kiker v. City of Philadelphia*, 346 Pa. 624, 31 A. 2d 289, which was a Bill in Equity to restrain the enforcement of the presently questioned Ordinance. In the *Kiker* case the Chief Justice and an Associate Justice dis-

sented. This Court, in line with its policy as to Federal non-interference with future State enforcement of taxing statutes, refused certiorari. *Kiker v. City of Philadelphia*, 320 U. S. 741, 88 L. ed. 439. The decision of the Supreme Court of Pennsylvania, as that Court states in its Opinion, was a case of first impression and involved an interpretation of the controlling Act of Congress. The Opinion of that Court is, in your petitioner's submission, an erroneous decision of the meaning of that Act and thus raises an important question of Federal law which has not been but should be settled by this Court.

14. Petitioner's case is a test case to establish the rights of thousands of residents of New Jersey who work at League Island Navy Yard, many of whom have resisted payment of this tax on the ground that it violates their constitutional rights. Hundreds of others, after much resistance, are now paying the tax, under protest, under a refund agreement with the City of Philadelphia should this tax be ultimately held to be invalid as to New Jersey residents by this Court. Thus, the question is of great public importance and a decision by this Court would quiet much unrest, which on one occasion, even during the war, resulted in a deplorable work stoppage at the Navy Yard.

15. Petitioner specially set up his right not to be deprived of his property under the due process clause of the Fourteenth Amendment of the United States Constitution and in petitioner's submission, the decision of the Superior Court of Pennsylvania constitutes a denial of that right.

16. Petitioner specially set up and claimed that to compel him, a resident of the State of New Jersey, to pay this tax to the City of Philadelphia, when, in fact, he received no reciprocal benefits whatever from said City, constituted a denial to him of his privileges and immunities under the

Fourteenth Amendment to the Constitution of the United States and in petitioner's submission, the Opinion of the Superior Court of Pennsylvania improperly denied such claim.

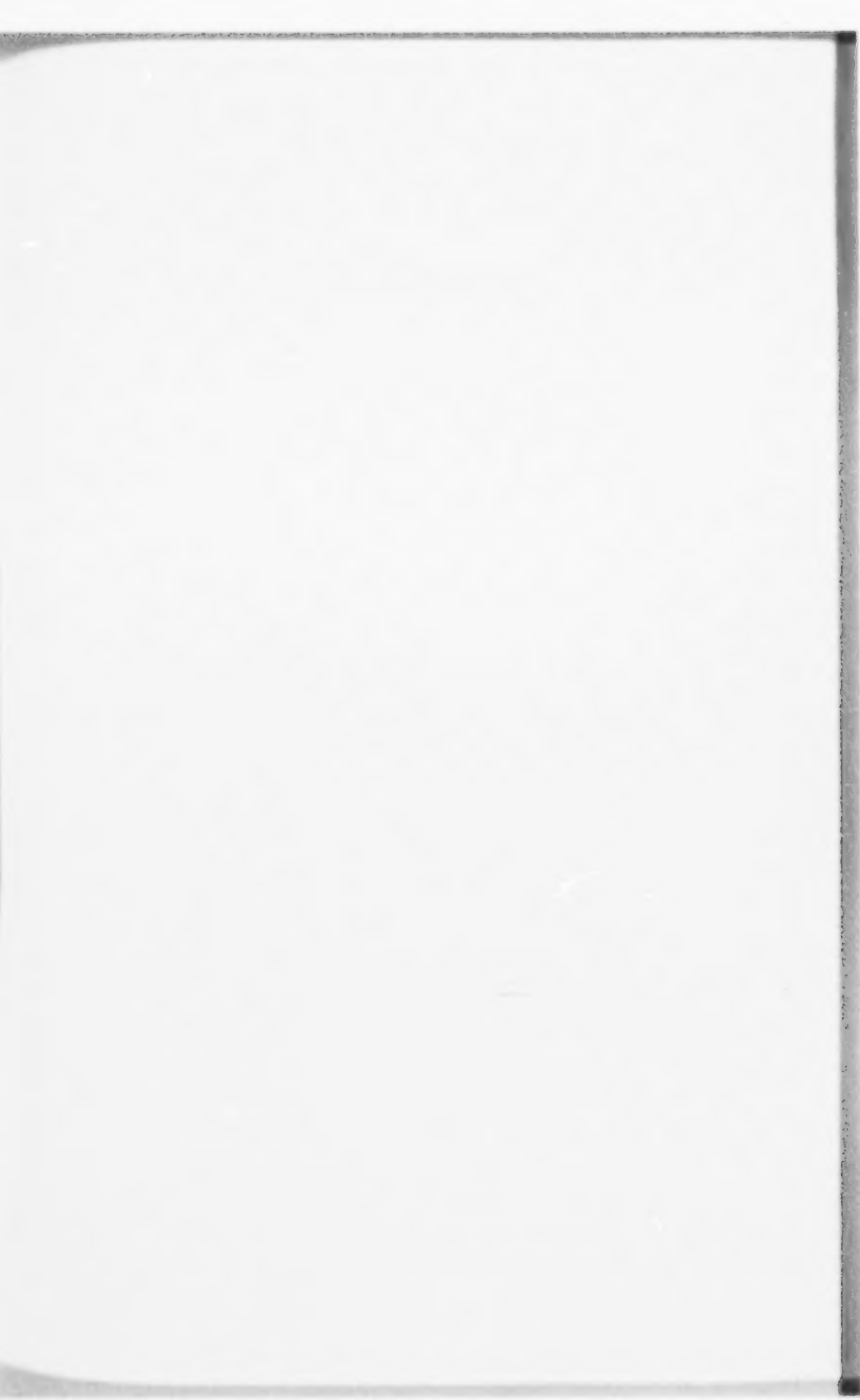
17. The attempted extension of the penal jurisdiction of the City of Philadelphia to a Federal reservation is a serious question involving the interrelation of State and Federal Governments. If this extension is valid and if it is to secure general public and peaceful acceptance by the citizens of New Jersey, it should rest only on a decision of this Court. The Superior Court of Pennsylvania agreed that the fine imposed by Section 9 of the Ordinance was not civil but criminal even though collected by civil procedure. Nevertheless, it sustained the jurisdiction on the basis of the decision of the Supreme Court of Pennsylvania in the *Kiker* case, *supra*, although that specific question had not been directly decided in that case.

WHEREFORE your petitioner respectfully prays that a writ of certiorari under Judicial Code sec. 237b, 28 U. S. C. A. 344b be issued out of and under the seal of this Honorable Court directed to the Superior Court of Pennsylvania to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the cause entitled and numbered on its docket City of Philadelphia vs. William G. Barnes, No. 156, October Term, 1945, including the record transmitted to it on appeal from the Court of Common Pleas No. 2 of Philadelphia County as of No. 993, December Term, 1944, and also the docket entries of the Superior Court showing the petition for allowance of appeal filed in the Supreme Court of Pennsylvania and its denial on January 11, 1946; that the said judgment of the said Superior Court of Pennsylvania may be reversed

and set aside by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

WILLIAM G. BARNES,
By THOMAS D. McBRIDE,
Counsel for Petitioner.





SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1094

WILLIAM G. BARNES,

vs.

Petitioner,

CITY OF PHILADELPHIA

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

Jurisdiction

This Court has jurisdiction to review the judgment of the Superior Court of Pennsylvania either by certiorari, under authority of Judicial Code, sec. 237b, 43 Stat. 937, 28 U. S. C. A. 344b, or by Appeal under authority of Judicial Code, sec. 237a, 43 Stat. 937, 28 U. S. C. A. 344a, since there was drawn in question the validity of a statute of the State of Pennsylvania on the ground of its being repugnant to the Constitution of the United States and the decision of the court was in favor of its validity. A municipal ordinance enacted by virtue of power delegated by the legislature of the state is a state law within the meaning of the Judicial Code which confers jurisdiction on

this Court. *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U. S. 548, 34 S. Ct. 364; *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716. In *United States, et al. v. Allegheny County, Pa.*, 322 U. S. 174, 64 S. Ct. 908, this Court reviewed by appeal.

The Superior Court of Pennsylvania entered its judgment on November 19, 1945. The Supreme Court of Pennsylvania is the highest court in that state and it declined discretionary review on January 11, 1946. This petition is therefore timely and is properly addressed to the Superior Court of Pennsylvania. *American Railway Express Co. v. Levee*, 263 U. S. 19, 44 S. Ct. 11.

II

ARGUMENT

The City of Philadelphia Does Not Have Jurisdiction to Tax the Income of a Resident of New Jersey Who Is Employed in the Navy Yard at League Island.

League Island lies on the westerly bank of the Delaware River, just above the mouth of the Schuylkill River, and originally was a part of the City of Philadelphia. The Commonwealth of Pennsylvania, by the Acts of March 29, 1827, P. L. 153; February 10, 1863, P. L. 24; and April 4, 1866, P. L. 96, granted consent to the United States government, inter alia, to purchase and acquire, for naval and other purposes, a tract of land in the City and County of Philadelphia, known as League Island; and also ceded to the Federal government the right to exclusive jurisdiction thereover, providing, however, "That the cession * * * made shall continue in force so long as the * * * territory shall be used by the government of the United States for the purposes of a navy yard, and no longer: And provided, also, That all process, civil and criminal, of the commonwealth of Pennsylvania, shall extend into, and be

effectual, within the territory hereby ceded, as if this law had not passed." Pursuant to appropriate federal legislation, approved February 18, 1867, 14 U. S. St. at L., c. 46, p. 396, a Certificate of Acceptance of this tract in the City and County of Philadelphia, dated December 23, 1868, was recorded in the office of the Recorder of Deeds in Philadelphia County in Volume 19 (J. T. O. 2), Miscellaneous Land Records, p. 208. The Certificate of Acceptance appears in the Appendix, p. 32.

Since that time League Island has been under the exclusive jurisdiction of the Federal government save for the minor exception as to service of process noted above.

The Pennsylvania legislature, on August 5, 1932, P. L. 45, sec. 1, 53 P. S. 4613, authorized cities of the first and second classes to tax generally all subjects of taxation which the state may tax but which it has not yet taxed "within the limits of such city of first and second class." The City of Philadelphia is a city of the first class.

Section 3 of the same Act, 53 P. S. 4615, provides:

"The council of cities of the first and second classes shall have power to prescribe and enforce penalties for the nonpayment, within the time fixed for their payment, of taxes imposed under authority of this act, and for the violation of the provisions of ordinances passed under authority of this act."

The Act of March 25, 1929, P. L. 66, No. 75, sec. 1, 53 P. S. 3451, provides as follows:

"The cities of the first class of this Commonwealth shall have the power to make all such ordinances, by-laws, rules, and regulations not inconsistent with or restrained by the Constitution and laws of this Commonwealth as may be expedient or necessary for the proper management, care, and control of the city and its finances, and the maintenance of the peace, good government, safety, and welfare of the city and its

trade, commerce, manufactures; and the exercise of full and complete powers for local self-government in matters of police, and the same to alter, modify and repeal at pleasure; and to enforce all ordinances by imposing fines upon inhabitants or other persons for violation thereof, not exceeding one hundred dollars for any one offense, recoverable with costs, together with judgment of imprisonment not exceeding thirty days if the amount of said fines and costs shall not be paid into the court imposing the fines within ten days from the date of the imposition thereof."

In pursuance of these acts the City Council of Philadelphia passed the Ordinance which is questioned in the present case.

Section 2 imposes an annual tax for general revenue purposes "on (a) salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia; and on (b) salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia; * * *"

Section 3, provides that "Each person whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 15th of each year, make and file with the Receiver of Taxes a return on a form furnished by or obtainable from the Receiver of Taxes, setting forth the aggregate amount of salaries, wages, commissions and other compensation or net profits earned by him during the preceding year and subject to the said tax, together with such other pertinent information as the Receiver of Taxes may require; * * *"

Section 9, provides that "Any person who shall fail, neglect or refuse to make any return required by this ordinance, or any taxpayer who shall fail, neglect or refuse to pay the tax, penalties and interest imposed by this ordinance, or any person who shall refuse to permit the Re-

ceiver of Taxes or any agent or employee appointed by him in writing to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits to avoid the payment of the whole or any part of the tax, shall be subject to a fine or penalty of one hundred (100) dollars and costs for each such offense, or to undergo imprisonment for not more than thirty days for the non-payment of such fine or penalty and costs within ten days from the imposition thereof.

Such fine or penalty shall be in addition to any other penalty imposed by any other section of this ordinance.

The failure of any employer or any taxpayer to receive or procure a return form shall not excuse him from making a return."

Section 10, provides that "This ordinance shall not apply to any person or property as to whom or which it is beyond the legal power of Council to impose the tax or duties herein provided for."

The Ordinance was sustained by the Supreme Court of Pennsylvania when attacked by a Philadelphia resident in *Dole v. Philadelphia*, 337 Pa. 375, 11 A. 2d 163, 767; also when attacked by an employe of the Commonwealth who was required to reside in Philadelphia in *Marson v. Philadelphia*, 342 Pa. 369, 21 A. 2d 228.

The Congress of the United States, on October 9, 1940, enacted Public Act No. 819. Section 2 of that Act, 54 Stat. 1060, 4 U. S. C. A. 14, provides as follows:

"(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and

such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940."

Section 4 of that Act provides as follows:

"The provisions of sections 1-6 shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area."

In Section 6, the term "Federal area" is defined as follows:

"The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State shall be deemed to be a Federal area located within such State."

Thereafter, the City sought to enforce the ordinance against various groups of Federal employees. A resident of Philadelphia, employed in a Federal area, challenged the validity of the tax as applied to him but his contention was rejected in *City v. Schaller*, 148 Pa. Super. 276, 25 A. 2d 406. The Supreme Court of Pennsylvania refused an allocatur and this Court refused to issue a writ of certiorari. 317 U. S. 649, 87 L. Ed. 522. Thereafter, the ordinance was again attacked by a New Jersey resident performing services at the League Island Navy Yard but his contention was dismissed by the Supreme Court of Pennsylvania in *Kiker*

v. *Philadelphia*, 346 Pa. 624, 31 A. 2d 289, in an Opinion by Mr. Justice Drew, concurred in by Justices Linn, Parker and Stearne. Chief Justice Maxey filed a dissenting opinion joined in by Mr. Justice Patterson. Mr. Justice Stern took no part in the consideration or decision of the case. This Court again refused to issue a writ of certiorari. 320 U. S. 741, 88 L. Ed. 439. All these cases were Bills in Equity seeking prior restraint of enforcement. The present case is the first and only one where a trial has been had which involves the penalty provision of the ordinance.

Petitioner believes that this Court has not decided the questions raised by the present record. In the courts below, the City has emphasized the two refusals of this Court to grant certiorari. But the settled policy of the Court has been that it will not exercise any previous restraint over the enforcement of a state taxing statute or ordinance.

The present question is whether the City of Philadelphia has "jurisdiction" to tax petitioner's income. There would appear to be little doubt that prior to the passage of Public Act 819 neither the State of Pennsylvania nor the City of Philadelphia had the right to tax persons or property at League Island Navy Yard. A State is without power to impose any taxes on persons or property or any piece of land it has owned but over which it ceded to the Federal government a grant of exclusive jurisdiction. *Standard Oil Co. v. California*, 291 U. S. 242, 244, 54 S. Ct. 381, 382; *Arlington Hotel Co. v. Fant*, 278 U. S. 439, 49 S. Ct. 227; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 50 S. Ct. 455. The State of Pennsylvania did cede exclusive jurisdiction over League Island to the Federal government.

The United States acquired title to the League Island Navy Yard under Article 1, Section 8, Clause 17 of the Federal Constitution which gives Congress power "to exercise exclusive legislation" over "all places purchased by

the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." The "exclusive legislation" stated therein is consistent only with "exclusive jurisdiction." *Surplus Trading Co. v. Cook, supra*; *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208.

The reservation of the right to send criminal or civil process into League Island applies only to actions begun in state courts for matters which occurred within the jurisdiction of the state and not those which occurred in League Island itself. This Court, in *United States v. Unzeuta*, 281 U. S. 138, 50 S. Ct. 284, 285, speaking of a similar cession by the State of Nebraska of land which later became the Fort Robinson Military Reservation, said:

"The conditions of the cession relating to the execution of criminal process were construed as intended to save the right to execute process within the reservation for crimes committed outside; that is, to prevent the reservation from being a sanctuary for fugitive offenders."

The Supreme Court of Pennsylvania in the *Kiker* case, followed by the Superior Court in the present case, while conceding that at the time the ordinance was passed it did not and could not apply to persons such as petitioner, held that Public Act No. 819 removed the disability. Petitioner contends that it did not. Much that petitioner would say in his brief has been said for him in the dissenting opinion of Chief Justice Maxey in the *Kiker* case, 31 A. 2d 289, 298, *et seq.* It would serve no useful purpose to repeat those views here. Briefly, however, petitioner submits that prior to the passage of Public Act No. 819, the City of Philadelphia could not tax petitioner, for two reasons:

First, he was and is a resident of New Jersey and receives no reciprocal benefits from it;

Second, he did not work nor have property within the limits of the City.

Public Act No. 819, of itself, did not remove either of these disabilities. Besides, the ordinance has not been amended, nor has the Pennsylvania legislature enacted any legislation, since the passage of Public Act No. 819. It is therefore pertinent to note that the ordinance, which had no application to petitioner at the time of its passage, provided in section 10: "This ordinance shall not apply to any person or property as to whom or which it is beyond the legal power of Council to impose the tax or duties herein provided for." Neither Public Act No. 819 nor any legislation of the State of Pennsylvania placed the Navy Yard at League Island within the taxing power of Philadelphia, whatever effect that Act had to locate it for taxing purposes within the State of Pennsylvania.

Section 6 of the Act, 4 U. S. C. A. 18, provides that a Federal area within the exterior boundaries of any state shall be deemed to be a Federal area within such state; but the Act does not say that such Federal area is deemed to be located within a particular municipality.

Petitioner submits, therefore, that this Act does not, in the absence of some other legislation, vest taxing authority in the City of Philadelphia. The municipal corporation of a state has no inherent power to tax and must take such power as is conferred under the conditions and limitations that may be prescribed and only in such cases and within such limits as are expressed. *Cooley on Taxation*, 4th Ed., Vol. 1, Sec. 125. See *Passenger Railway Co. v. Pittsburgh*, 226 Pa. 419, 75 A. 662; *Arthur v. School District of Polk Borough*, 164 Pa. 410, 30 A. 299. The grant of a right to a municipal corporation to levy taxes is strictly construed and not extended by implication. *Hillman Coal and Coke Co. v. Jenner Township, Somerset County*, 300 Pa. 108, 150 A. 293.

In *Frick v. Pennsylvania*, 268 U. S. 473, 489, 45 S. Ct. 603, 604, this Court said:

“It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state, receives none of the protection for which the tax is supposed to be the compensation.”

Petitioner believes, therefore, that he, as a New Jersey resident, has a right to resist a tax imposed by the City of Philadelphia where there is no express authority granted to that municipality by the Pennsylvania Legislature to tax persons working in League Island. The Supreme Court of Pennsylvania in the *Kiker* case (31 A. 2d at 297) held that the words “having jurisdiction to levy such a tax” as used in Public Act 819 simply means “the power of the taxing authority to impose the type of tax mentioned; it does not refer to its jurisdiction over the territory.” The Superior Court in the present case followed the *Kiker* case. But petitioner suggests that the language and analogy cited in the report of the sub-committee of the Committee on Finance of the United States Senate, quoted in the *Kiker* case (31 A. 2d at 296) shows that the purpose of the Act was to remove the exemption from income taxes “where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area.” The analogy given is between a naval officer who, being assigned for duty at the Naval Academy, secures quarters at the Academy and one also assigned there who is forced to seek quarters in the State of Maryland. Petitioner concedes that Public Act 819 sought to eliminate such discriminations. Petitioner denies,

however, that the purpose of Public Act 819 was to create a situation where Maryland could tax a naval officer assigned to duty at the Naval Academy at Annapolis but who lived in Virginia. Besides, in *Rivera v. Buscaglia*, 146 F. 2d 461 (1 Cir.) the Circuit Court of Appeals, speaking of the language used in the Public Salary Tax Act of 1939, 53 Stat. 574, said:

“The phrase ‘having jurisdiction to tax such compensation’ means that the taxing body must have authority to impose income taxes and that the particular federal employee is within its taxing jurisdiction, as the committee report makes clear. See S. Rep. No. 112, 76 Cong., 1 Sess., p. 11. It was so held in *Yerian v. Territory of Hawaii*, 1942, 9 Cir., 130 F. 2d 786, a case upholding an income tax imposed by the Legislature of Hawaii as applied to the salaries of federal employees.”

The Penal Provision of the Ordinance Is Invalid Because the Police Power of the City to Punish Offenses Created by It Does Not Extend to League Island Navy Yard.

As noted above an Act of the Pennsylvania Legislature of March 25, 1929, P. L. 66, Section 1, 53 P. S. 3451, provides:

“Be it enacted, &c., That the cities of the first class of this Commonwealth shall have the power to make all such ordinances, by-laws, rules, and regulations not inconsistent with or restrained by the Constitution and laws of this Commonwealth as may be expedient or necessary for the proper management, care, and control of the city and its finances, and the maintenance of the peace, good government, safety, and welfare of the city and its trade, commerce, manufactures; and the exercise of full and complete powers for local self-government in matters of police, and the same to alter, modify and repeal at pleasure; and to enforce all ordinances by imposing fines upon inhabitants or other

persons for violation thereof, not exceeding one hundred dollars for any one offense recoverable with costs, together with judgment of imprisonment not exceeding thirty days if the amount of said fines and costs shall not be paid into the court imposing the fines within ten days from the date of the imposition thereof."

In alleged pursuance of this Act the City Council of Philadelphia passed the Ordinance which is questioned in the present case. Section 9 provides as follows:

"Sect. 9. VIOLATIONS; PENALTIES. Any person who shall fail, neglect or refuse to make any return required by this Ordinance, or any taxpayer who shall fail, neglect or refuse to pay the tax, penalties and interest imposed by this Ordinance, or any person who shall refuse to permit the Receiver of taxes or any agent or employee appointed by him in writing to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits to avoid the payment of the whole or any part of the tax, shall be subject to a fine or penalty of one hundred (100) dollars and costs for each such offense, or to undergo imprisonment for not more than thirty days for the non-payment of such fine or penalty and costs within ten days from the imposition thereof.

Such fine or penalty shall be in addition to any other penalty imposed by any other section of this Ordinance.

The failure of any employer or any taxpayer to receive or procure a return form shall not excuse him from making a return."

It is readily seen that this section of the Ordinance is a penal provision in that it creates an offense and punishes a violation by fine or imprisonment. The City of Phila-

delphia did not proceed as for a summary offense before a magistrate but instead brought suit in the Common Pleas Court for collection of the fine by issuing a writ of *capias ad respondendum*. This fine, although collected by civil proceeding, would seem clearly to be substantively purely penal and results in imprisonment if it is not paid. It is in no sense a civil penalty such as that contained in Section 7, which reads as follows:

“Sect. 7. INTEREST AND PENALTIES. All taxes imposed by this ordinance remaining unpaid after they become due shall bear interest in addition to the amount of the unpaid tax at the rate of six per centum per year, and the persons upon whom said taxes are imposed shall be further liable to a penalty of one-half of one per centum of the amount of the unpaid tax for each month or fraction of a month for the first six months of non-payment.”

The Superior Court of Pennsylvania, in the present case, agreed that this fine was a criminal penalty in holding that even though the form of the suit was civil the defendant could not be called for cross-examination, could not be compelled to give evidence against himself and plaintiff's counsel could not adversely comment upon his failure to testify. A suit for a penalty is a “criminal case” within the meaning of the Fifth Amendment to the United States Constitution. *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524. It is a “criminal prosecution” within the meaning of Article 1, Section 9 of the Pennsylvania Constitution. *Boyle v. Smithman*, 146 Pa. 255, 23 A. 397; *Logan v. Pennsylvania R. R. Co.*, 132 Pa. 403, 19 A. 137; *Osborn v. First National Bank*, 154 Pa. 134, 26 A. 289.

Petitioner submits, therefore, that in view of the fact that the Federal government still has title to and exclusive territorial jurisdiction and police power over the League

Island Navy Yard, the City of Philadelphia could not denominate as an offense conduct committed in the Navy Yard and proceed to punish it. Unless the municipality has territorial jurisdiction over the place where the offense is committed it is without authority to punish it. *Frick v. Pennsylvania*, 268 U. S. 473, 489, 45 S. Ct. 603, 604; *United States v. Unzeuta*, 281 U. S. 138, 50 S. Ct. 284.

The evidence in the case shows that petitioner was never within the limits of the City of Philadelphia proper. He does not pass through that City going to or returning from work (R. 80a-81a). Therefore, if any offense was committed, it was committed by petitioner either in the Navy Yard itself or in the State of New Jersey where he resides. The City of Philadelphia sought to obtain a penal judgment, non-payment of which would result in imprisonment, for failure to file a report as to petitioner's income. That was the issue submitted to the jury (R. 116a). Where is this offense committed? The City argues that it took place at the office of the Receiver of Taxes in Philadelphia where the Ordinance, by Section 3, provided that the report should be sent. But the Ordinance does not even require that the return be personally delivered by the taxpayer. Even if it did, petitioner submits that Philadelphia could not compel a resident of New Jersey to come within its jurisdiction under pain of imprisonment for disobedience. Certainly it cannot do so unless he is otherwise subject to its jurisdiction, such as for instance if he had been subpoenaed while at the Navy Yard in a judicial matter then pending in Philadelphia. It seems clear that if it be true that Philadelphia cannot directly denominate as offenses acts committed within the Navy Yard it cannot indirectly achieve the same result. The venue of an offense is the place where the act or failure to act takes place. Here, petitioner's failure took place either in the Navy Yard or in the State of New Jersey,

both of which are without the territorial boundaries of the City. In a proceeding instituted for recovery of a penalty the record must show that the offense occurred within the corporate limits of the municipality. *Philadelphia v. Nell*, 3 Yeates 475.

Public Act No. 819 does not alter the exclusive territorial jurisdiction of offenses committed within Federal areas. In fact, it specifically preserves that jurisdiction unfettered. Section 4, 54 Stat. 1060, 4 U. S. C. A. 16. For purposes of levying and collecting taxes Federal areas located within the exterior boundary of a state are deemed by Section 6 of that Act to be a Federal area located within such state, but nothing in that Act or in any Act of the Pennsylvania Legislature extended the police power of the City of Philadelphia to the Navy Yard. Hence, the Navy Yard is without the police power of Philadelphia just as much as it is without the police power of any other municipality of the Commonwealth of Pennsylvania.

Therefore petitioner respectfully submits that the penal provision of this Ordinance cannot be sustained.

Respectfully submitted,

THOMAS D. McBRIDE,
702 Liberty Trust Building,
Philadelphia, Pennsylvania,
Counsel for Petitioner.

APPENDIX A**AN ORDINANCE**

Imposing a tax for general revenue purposes on salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia, and on salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia, and on the net profits earned after January 1, 1939, of businesses, professions or other activities conducted by such residents, and on the net profits earned after January 1, 1939, of businesses, professions or other activities conducted in Philadelphia by non-residents; requiring the filing of returns and the giving of information by employers and those subject to the said tax; imposing on employers the duty of collecting the tax at source; providing for the administration, collection and enforcement of the said tax; and imposing penalties.

Section 1. *The Council of the City of Philadelphia ordains*, That the following words, when used in this ordinance, shall have the meaning ascribed to them in this section, except where the context clearly indicates or requires a different meaning.

Definitions

“Association.” A partnership, limited partnership, or any other form of unincorporated enterprise, owned by two or more persons.

“Business.” An enterprise, activity, profession, or undertaking of any nature conducted for profit or ordinarily conducted for profit, whether by an individual, co-partnership, association, or any other entity.

“Corporation.” A corporation or joint stock association organized under the laws of the United States, the State of Pennsylvania, or any other State, territory, or foreign country or dependency.

“Employer.” An individual, copartnership, association, corporation, governmental body or unit or agency, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis.

“Net Profits.” The net gain from the operation of a business, profession, or enterprise, after provision for all costs and expenses incurred in the conduct thereof, either paid or accrued in accordance with the accounting system used, and without deduction of taxes based on income.

“Non-resident.” An individual, copartnership, association, or other entity domiciled outside the City of Philadelphia.

“Person.” Every natural person, copartnership, fiduciary or association. Whenever used in any clause prescribing and imposing a penalty, the term “person,” as applied to associations, shall mean the partners or members thereof, and as applied to corporations, the officers thereof.

“Resident.” An individual, copartnership, association, or other entity domiciled in the City of Philadelphia.

“Taxpayer.” A person, whether an individual, copartnership, association, or any other entity, required hereunder to file a return of earnings or net profits, or to pay a tax thereon.

The singular shall include the plural, and the masculine shall include the feminine and the neuter.

Sect. 2. Imposition of Tax. An annual tax for general revenue purposes of one and one-half per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia; and on (b) salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia; and on (c) the net profits earned after January 1, 1939, of businesses, professions or other activities conducted by such residents, and on (d) the net profits earned after January 1, 1939, of businesses, professions or other activities conducted in Philadelphia by non-residents.

The tax levied under (a) and (b) herein shall relate to and be imposed upon salaries, wages, commissions and other compensation paid by an employer or on his behalf to any person who is employed by or renders services to him. The tax levied under (c) and (d) herein shall relate to and be imposed on the net profits of any business, profession or enterprise carried on by any person as owner or proprietor, either individually or in association with some other person or persons.

Said tax shall first be levied, collected and paid with respect to the salaries, wages, commissions and other compensation earned during the calendar year one thousand nine hundred and forty, and with respect to the net profits of businesses, professions or other activities, earned during the calendar year one thousand nine hundred and thirty-nine: *Provided, however,* That where the fiscal year of the business, profession, or other activity differs from the calendar year, the tax shall be applicable to the net profits of the fiscal year, with respect to such portion thereof as was earned subsequent to the thirty-first day of December, one thousand nine hundred and thirty-eight.

Sect. 3. Returns and Payment of Tax. Each person whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 15th of each year, make and file with the Receiver of Taxes a return on a form furnished by or obtainable from the Receiver of Taxes, setting forth the aggregate amount of salaries, wages, commissions and other compensation or net profits earned by him during the preceding year and subject to the said tax, together with such other pertinent information as the Receiver of Taxes may require: *Provided, however,* That where the return is made for a fiscal year or any other period different from a calendar year, the said return shall be made within seventy-five days from the end of the said fiscal year or other period.

Such return shall also show the amount of the tax imposed by this ordinance on such earnings and profits. The person making the said return shall, at the time of filing thereof, pay to the said Receiver of Taxes the amount of tax shown as due thereon: *Provided, however,* That the

taxpayer shall have the right to pay the tax, or the balance of the tax as shown on the return, in four quarterly installments, the first installment thereof at the time of the filing of the return on or before March 15th, and the other installments thereof on or before June 15th, September 15th and December 15th, respectively, in the said year: *Provided further*, That where any portion of the tax so due shall have been deducted at source and shall have been paid to the Receiver of Taxes by the person making the said deduction, credit for the amount so paid shall be deducted from the amount shown to be due and only the balance, if any, shall be due and payable at the time of the filing of the said return, or as hereinabove provided: *Provided further*, That the Receiver of Taxes is authorized to provide by regulation that the return of an employer or employers, showing the amount of tax deducted by him or them from the salary, wages or commissions of an employee, and paid by him or them to the Receiver of Taxes shall be accepted as the return required of any employee whose sole income subject to the tax under this ordinance, is such salary, wages or commissions.

Sect. 4. Collection at Source. Each employer within the City of Philadelphia who employs one or more persons on a salary, wage, commission or other compensation basis shall deduct, monthly or more often than monthly, at the time of the payment thereof, the tax of one and one-half per centum of salaries, wages, commissions or other compensation due by the said employer to the said employee and shall, on or before the fifteenth day of the month next following the said deduction make a return and pay to the Receiver of Taxes the amount of tax so deducted. Said return shall be on a form or forms furnished by or obtainable from the said Receiver of Taxes and shall set forth the names and residence of each employee of said employer during all or any part of the preceding month, the amounts of salaries, wages, commissions or other compensation earned during such preceding month by each of such employees, together with such other pertinent information as the Receiver of Taxes may require: *Provided, however*, That the failure or omission by any employer, either resid-

ing within or outside of the City, to make such return and/or pay such tax, shall not relieve the employee from the payment of such tax and the compliance with such regulations, with respect to making returns and payment thereof, as may be fixed in this ordinance or established by the Receiver of Taxes.

Sect. 5. Duties of Receiver of Taxes. It shall be the duty of the Receiver of Taxes to collect and receive the tax imposed by this ordinance. It shall also be the duty of the Receiver of Taxes, in addition to keeping the records now required by law or ordinance, to keep a record showing the amount received by him from each taxpayer and the date of such receipt.

Sect. 6. Enforcement; Rules and Regulations; Inquisitorial Powers of the Receiver of Taxes. A. The Receiver of Taxes is hereby charged with the enforcement of the provisions of this ordinance, and is hereby empowered to prescribe, adopt, promulgate and enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this ordinance, including provision for the re-examination and correction of returns and payments alleged or found to be incorrect or as to which an overpayment or underpayment is claimed or found to have occurred.

B. The Receiver of Taxes or any agent or employee authorized in writing by him is hereby authorized to examine the books, papers and records of any employer, or supposed employer, or of any taxpayer or supposed taxpayer in order to verify the accuracy of any return made, or if no return was made, to ascertain the tax imposed by this ordinance. Every such employer or supposed employer or taxpayer or supposed taxpayer is hereby directed and required to give to the said Receiver of Taxes or his duly authorized agent or employee the means, facilities and opportunity for such examinations and investigations as are hereby authorized. The Receiver of Taxes is hereby authorized to examine any person under oath concerning any income which was or should have been returned for taxation, and to this end may compel the production of books,

papers and records and the attendance of all persons before him, whether as parties or witnesses, whom he believes to have knowledge of such income.

C. Any information gained by the Receiver of Taxes, or any other official or agent of the City as a result of any returns, investigations, hearings or verifications required or authorized by this ordinance, shall be confidential, except for official purposes, and except in accordance with proper judicial order, or as otherwise provided by law, and any person or agent divulging such information, shall be subject to a fine or penalty of one hundred (100) dollars and costs for each offense, or to undergo imprisonment for not more than thirty days for the nonpayment of such fine or penalty and costs within ten days from the imposition thereof.

Sect. 7. Interest and Penalties. All taxes imposed by this ordinance remaining unpaid after they become due shall bear interest in addition to the amount of the unpaid tax at the rate of six per centum per year, and the persons upon whom said taxes are imposed shall be further liable to a penalty of one-half of one per centum of the amount of the unpaid tax for each month or fraction of a month for the first six months of non-payment.

Sect. 8. Collection of Unpaid Taxes. All taxes imposed by this ordinance, together with all interest and penalties, shall be recoverable by the City Solicitor as other debts of like amount are recoverable.

Sect. 9. Violations; Penalties. Any person who shall fail, neglect or refuse to make any return required by this ordinance, or any taxpayer who shall fail, neglect or refuse to pay the tax, penalties and interest imposed by this ordinance, or any person who shall refuse to permit the Receiver of Taxes or any agent or employee appointed by him in writing to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits to avoid the payment of the whole or any part of the tax, shall be subject to a fine or penalty of one hundred

(100) dollars and costs for each such offense, or to undergo imprisonment for not more than thirty days for the non-payment of such fine or penalty and costs within ten days from the imposition thereof.

Such fine or penalty shall be in addition to any other penalty imposed by any other section of this ordinance.

The failure of any employer or any taxpayer to receive or procure a return form shall not excuse him from making a return.

Sect. 10. Applicability. This ordinance shall not apply to any person or property as to whom or which it is beyond the legal power of Council to impose the tax or duties herein provided for.

Sect. 11. Construction. If any sentence, clause or section or part of this ordinance is for any reason found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses or sections or parts of this ordinance. It is hereby declared as the intent of the Council that this ordinance would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included herein.

Approved the thirteenth day of December, A. D. 1939.

GEORGE CONNELL,
Acting Mayor of Philadelphia.

APPENDIX B

HON. GIDEON WELLES.

I, Gideon Welles, Secretary of the Navy of the United States of America, do hereby certify that the title to a certain island in the Delaware River at and above the mouth of the Schuylkill River, in the City and County of Philadelphia called and Known as "League Island", together with all the Marsh east of or in any other direction adjacent or appurtenant thereto containing about six hundred acres be the same more or less, together also with all the riparian

rights and privileges thereunto belonging and appertaining to the same and also all that the tract or piece of land situate in the first ward of the said City of Philadelphia Beginning at a stake set for a corner at the intersection of the south line of a certain Avenue one hundred twenty feet wide proposed to be laid out and opened and the low water line of the River Schuylkill, thence extending by the several courses and distances of the said low water line to the low water line of the Back Channel of the River Delaware, thence along the several courses and distances of the said low water line of the Back Channel to the stake set for a corner in the western side of the said one hundred and twenty feet wide Avenue, which stake is at the distance of six thousand four hundred and forty-two and one-tenth ($6442\frac{1}{10}$) feet southward from the south line of Curtin Street and sixty-five (65) feet easterly from the east line of Meadow Street, thence northward along a line parallel with Meadow Street along the west line of said Avenue four hundred forty-two and one-tenth ($442\frac{1}{10}$) feet to an angle in said Avenue, thence further along said Avenue northwestwardly two thousand six hundred thirty-four and eight-tenths ($2634\frac{8}{10}$) feet to a stone in the River bank marked "U. S.", thence upon the same line and course four hundred forty-three (443) feet seven and one-half ($7\frac{1}{2}$) inches to another stone marked "U. S." at an angle in said Avenue, thence further along said Avenue westerly through a stone marked "U. S." located in the center of Old Lane five thousand one hundred ninety-two (5192) feet and one-tenth of a foot to another angle in said Avenue, thence still further along said Avenue southwesterly five thousand one hundred fifty-six and eight-tenths ($5156\frac{8}{10}$) feet through a stone set in the River bank marked "U. S." to low water mark in the River Schuylkill and place of beginning. Together with the whole of the said creek Known as the Back Channel from the River Schuylkill to the River Delaware has been and is hereby accepted by the United States from the city authorities of the City of Philadelphia the same having in conformity with the statute been submitted to the Attorney General and being found complete and indefeasible and the said land on the north short of said Back Channel having been found necessary to en-

able the Government to have the sole and exclusive use of said Back Channel and both shores thereof and the acceptance of the whole having been recommended by a Board of Officers duly appointed by the President in accordance with the requirements of the Act of Congress approved the eighteenth day of February Anno Domini one thousand eight hundred sixty-seven. This Certificate is given for the purpose of being recorded in the way and manner pointed out by the Act of General Assembly of the Commonwealth of Pennsylvania approved the tenth day of February Anno Domini 1863 and of the supplement thereto approved the fourth day of April Anno Domini one thousand eight hundred and sixty-six.

In Testimony whereof I have hereunto set my hand and affixed my official seal at Washington in the District of Columbia this twenty-third day of December in the year of our Lord one thousand eight hundred and sixty-eight (1868).

GIDEON WELLES,
Secretary of the Navy.

Witnesses:

WM. FOXON,
Asst. Secretary of the Navy;
C. P. THOMPSON,
Acting Chief Clerk.

Recorded Dec. 24, 1868

To be found in Volume 19 (J. T. O. 2) Miscellaneous Land Records of Recorder of Deeds, Philadelphia, p. 208.





Sup

WILLIAM G. BARNES

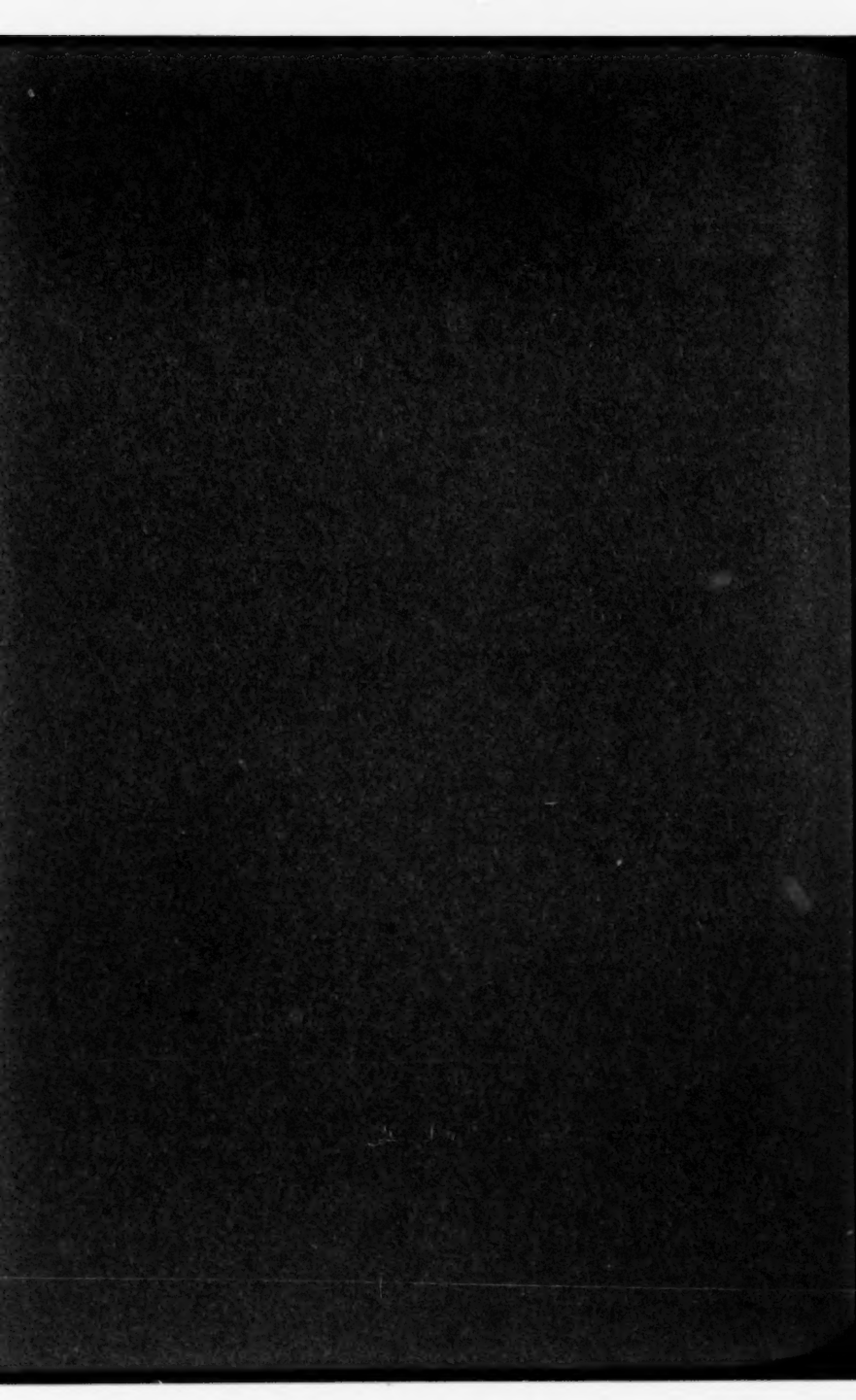
CITY OF NEW YORK

ANSWER A

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SUPREME COURT OF THE UNITED STATES.

October Term, 1945.

No. 1094.

WILLIAM G. BARNES,

Petitioner,

vs.

CITY OF PHILADELPHIA.

**ANSWER AND BRIEF OF CITY OF PHILADELPHIA IN
OPPOSITION TO PETITION FOR WRIT OF CERTI-
ORARI TO THE SUPERIOR COURT OF THE STATE
OF PENNSYLVANIA.**

TO THE HONORABLE, THE CHIEF JUSTICE AND AS-
SOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

The answer of the City of Philadelphia, by its attorneys, Frank F. Truscott, City Solicitor, and Abraham Wernick, Assistant City Solicitor, to the petition for writ of certiorari to the Superior Court of the State of Pennsylvania, respectfully represents:

(1) The petitioner prays that a writ of certiorari issue herein to review a certain final decision of the Superior Court of the State of Pennsylvania.

This final decision was rendered by the Superior Court of Pennsylvania on November 19, 1945; whereas a typewritten petition for writ of certiorari was filed in this Court on April 10, 1946, which was more than three months after the entry of the final judgment by the Superior Court. The jurisdiction of the Superior Court of the State of Pennsylvania is final in all actions, at law or in equity, where the amount or value thereof really in controversy be not greater than \$2,500., exclusive of costs. (Act of June 24, 1895, P. L. 212; amended May 5, 1899, P. L. 248, and further amended March 2, 1923, P. L. 3, No. 2; 17 P. S. 184.)

(2) The petitioner is in error when he states that in going to and from his work he does not pass through the City proper, as there is no legally admissible evidence in the record to that effect. Assuming, however, that the evidence which was stricken from the record should be considered to the effect that the petitioner travelled to the Philadelphia Navy Yard by boat from New Jersey, it was further testified that the boat travelled in the space between the Navy Yard and the center of the Delaware River; and since the boundaries of Philadelphia run to the center of the river, the petitioner then passed through the City of Philadelphia with the same force and effect as if he were walking on the streets of Philadelphia.

(3) The petitioner is further in error in stating that all of the cases where this Court refused to allow writs of certiorari were bills in equity asking prior restraint of enforcement, since *CITY v. SCHALLER*, 148 Pa. Super. Ct. 276, 25 A. (2d) 406; 317 U. S. 649, 87 L. ed. 522, involved a civil suit against the taxpayer wherein the taxpayer invoked the provisions of the Federal Constitution as a defense in resisting the right of the City of Philadelphia to collect the City income tax from a Federal employee working in the Philadelphia Navy Yard.

(4) The Philadelphia Income Tax Ordinance was enacted on December 13, 1939 and became effective on January 1, 1940 as to all residents of Philadelphia, regardless of where

they earned their income, and as to non-residents who were earning their income in Philadelphia, with the exception of non-residents who were performing services for the Federal Government in Federal areas, title to which were in the United States of America. As to the latter, the income tax authorities ruled that the provisions of the Philadelphia Income Tax Ordinance applied to all compensation earned after December 31, 1940, under Public Act 819, enacted by Congress on October 9, 1940, c. 787, 54 Stat. 1060, 4 U. S. C. A. 14. Since January 1, 1941 up until the present time many thousands of non-resident Federal employees performing services both at League Island Navy Yard and other Federal reservations have paid millions of dollars of taxes without any protest and without any understanding that it would be refunded.

A group of residents of New Jersey are the only ones who protested the payment of this tax and, in order to enable the members of this group to more easily pay the tax, the Receiver of Taxes agreed to accept the delinquent taxes in installment payments, but the representative of the group insisted that the Receiver of Taxes insert a clause that if by some chance it were held that the tax was not collectible then refunds would be made. Since that time, however, on December 29, 1945 Council of the City of Philadelphia adopted an Ordinance abating all interest and penalties on delinquent taxes due from wage earners, provided all delinquent taxes be paid by February 15, 1946, and many non-resident Federal employees paid their taxes without protest, including the seven defendants whose names appear in the record filed with this Court.

The petitioner is the only one who is still resisting the payment of the tax although the Ordinance has been in force since January 1, 1940. He has been employed at the League Island Navy Yard since 1940 and in 1943 earned \$3,449.25 and in 1944 earned \$4,649.74 (R. 36a).

(5) There has been collected since the Ordinance has been in force over \$120,000,000. and approximately one-

third of this sum came from non-residents. At one time there were over 180,000 Federal employes performing services in Philadelphia. So that if, at this late date, the petitioner should succeed, it would mean that the City of Philadelphia would be flooded with claims for refunds by many thousands of non-residents for sums involving many millions of dollars, the result of which would be financial disaster to the City of Philadelphia, as the money has been spent for municipal purposes.

For reasons appearing in the accompanying brief, the City of Philadelphia prays your Honorable Court to dismiss the petition for a writ of certiorari.

And defendant will ever pray.

CITY OF PHILADELPHIA,

By:

FRANK F. TRUSCOTT,

City Solicitor,

ABRAHAM WERNICK,

Assistant City Solicitor,

Counsel for City of Philadelphia.

**BRIEF IN SUPPORT OF ANSWER IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF THE STATE OF PENN-
SYLVANIA.**

I.

STATEMENT OF QUESTIONS INVOLVED.

(1) Was the Court justified in taking judicial notice that League Island was within the territorial limits of Philadelphia?

(2) When Congress by Public Act 819 authorized taxing

authorities not only to levy but also to *collect* income taxes within a Federal area within such State to the same extent as though such area was not a Federal area, will a writ of *capias* lie to collect penalties for failure to file returns and pay income taxes imposed by the City of Philadelphia from a non-resident employed at League Island?

(3) Must a State accept a retrocession or relinquishment of jurisdiction from the Federal Government before it becomes valid?

II.

ARGUMENT.

(1) Was the Court justified in taking judicial notice that League Island was within the territorial limits of Philadelphia?

The Trial Court as well as the Superior Court, relying on *KIKER v. PHILA.*, 346 Pa. 624, 31 A. (2d) 289, 320 U. S. 741, 88 L. ed. 439, took judicial notice that League Island was within the territorial limits of Philadelphia. That the Court was fully justified in this action is clearly demonstrated in the opinion of the Supreme Court of Pennsylvania in the Kiker Case. The Supreme Court of Pennsylvania said:

"League Island lies on the westerly bank of the Delaware River, just above the mouth of the Schuylkill, and originally was a part of the City of Philadelphia."

Several legal authorities are cited to support the principle that the Court may take judicial notice of this fact. The facts are in accord with the judicial knowledge of the Court.

The Act of February 10, 1863, P. L. 24, under which title to League Island was ceded to the United States, reads in part:

"That the consent of the Commonwealth of Pennsyl-

vania is hereby granted to the United States of America, to purchase and acquire title to all that island in the Delaware River, at and above the mouth of the Schuylkill River, in the City and County of Philadelphia, called and known as 'League Island' * * *."

It will thus be seen from the Act of Assembly cited, League Island is described as being in the City and County of Philadelphia.

The ordinance of Council of April 9th, 1864 (page 151 of Published Ordinances) authorizes the City Solicitor to examine the title to the whole of League Island which is described as being in the First Ward of the City of Philadelphia and the sum of \$340,000.00 is appropriated for the purchase of League Island from the Pennsylvania Company, and the Mayor is requested to tender League Island to the United States Government as a location for a Navy Yard or Naval Depot.

In the Ordinance of Council of July 23, 1867 (page 261 of Published Ordinances) it is stated that under An Act of Congress of February 18, 1867, the Secretary of the Navy was authorized to accept title to League Island from the City of Philadelphia.

This is further record proof of which the Court could take judicial notice that League Island belonged to Philadelphia and was a part of it.

It is quite true that this State, when ceding to the Government title to League Island, granted to the Government exclusive jurisdiction over League Island reserving unto itself only the right to serve civil and criminal processes; and the City recognizes the fact that when it did so it had no power, as the law then stood, to impose taxes upon persons working within such Federal Reservation; *but it does not follow that League Island did not remain physically within the geographical limits of Philadelphia.*

The Legislature, in the Act of February 2, 1854, P. L. 21, commonly known as "The Consolidation Act", fixed the boundary lines of the City and County of Philadelphia and

the various wards contained therein. Section 2 of said Act provides that the City shall be divided into Wards, and then described the boundaries of twenty-four wards. The First Ward is described as follows:

"FIRST WARD, That part thereof bounded as follows: Beginning at Wharton street and the river Delaware; thence along Wharton street to the Passyunk road; thence along the Passyunk road to Little Washington street; thence along Washington to Broad street; thence along Broad street to South street; thence along South street to the river Schuylkill; thence along the river Schuylkill to its junction with the river Delaware; thence along the river Delaware to the place of beginning, *together with League Island.*" (Italics supplied.)

It will thus be observed that League Island is included within the boundaries of the First Ward of the City and County of Philadelphia and is bounded by the Delaware River; and since the Act of 1854 further provides in Section 2, that when a river is named as a boundary the center thereof shall be understood, *it follows that the southern boundary of Philadelphia runs to the center of the Delaware River.*

It is respectfully urged that the Superior Court of Pennsylvania was bound to take judicial notice that League Island was within the territorial limits of Philadelphia because it is true as a physical fact and also because the Supreme Court of Pennsylvania so held. It is further respectfully urged that this decision is binding upon your Honorable Court.

- (2) When Congress by Public Act 819 authorized taxing authorities not only to levy but also to COLLECT income taxes within a Federal area within such State to the same extent as though such area was not a Federal area, will a writ of *habeas corpus* lie to collect penalties for failure to file returns and pay income taxes imposed by the City of Philadelphia from a non-resident employed at League Island?

Section 2 (a) of Public Act 819, enacted on October 9, 1940, 54 Stat. 1060, 4 U. S. C. A. 14, appears on pages 15 and 16 of the petitioner's brief. It is there provided that no person shall be relieved from liability for any income tax levied " * * * by any duly constituted taxing authority * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area * * *." It further provides:

" * * * and such State or taxing authority shall have full jurisdiction and power to levy and *collect* such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area." (*Italics supplied.*)

It is quite obvious from this language that if League Island Navy Yard is a Federal area within the State of Pennsylvania and the City of Philadelphia, that Philadelphia, after December 31, 1940, had *full jurisdiction and power* not only to levy an income tax therein but also to *collect* such a tax.

Let us, therefore, consider whether League Island Navy Yard falls within the definition of "Federal area," as contained in Public Act 819.

Section 6 of this Act, which appears on page 16 of the petitioner's brief, defines "Federal area" as follows:

"The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of

the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State shall be deemed to be a Federal area located within such State."

Since the Supreme Court of Pennsylvania in the Kiker Case held that League Island "is now physically a part of the mainland of this Commonwealth * * *" and is geographically within the limits of Philadelphia, then it follows that League Island Navy Yard is a Federal area located within the exterior boundaries of the State of Pennsylvania, under the definition contained in Section 6 of Public Act 819.

Being within the territorial limits of Philadelphia, then any person, even though a non-resident, performing services therein would be subject to the provisions of the Philadelphia Income Tax Ordinance with the same force and effect as if he performed services in any other portion of Philadelphia.

The Philadelphia Income Tax Ordinance of 1938, which was similar to the provisions of the Income Tax Ordinance of December 13, 1939, page 656, was sustained by the Supreme Court of the State of Pennsylvania in BUTCHER v. PHILA., 333 Pa. 497, 6 A. (2d) 298, and it was held to apply both to non-residents performing services in Philadelphia as well as to residents of Philadelphia, regardless of where they performed services.

The City Income Tax Ordinance of December 13, 1939, page 656 was sustained in —

DOLE v. PHILA., 337 Pa. 375, 11 A. (2d) 163;

GUERRA v. PHILA., 30 Fed. Supp. 791;

STOUDT v. PHILA., 38 D. & C. 222 (Pa.);

MARSON v. PHILA., 342 Pa. 369, 21 A. (2d) 228;

CITY OF PHILA. v. SCHALLER, 148 Pa. Super.

Ct. 276, 25 A. (2d) 406; 317 U. S. 649, 87 L. ed. 522;

KIKER v. PHILA., 346 Pa. 624, 31 A. (2d) 289,
 320 U. S. 741, 88 L. ed. 439;
 PENNA. CO. v. PHILA., 346 Pa. 406, 31 A. (2d)
 137;
 PHILA. v. SPEESE, et al., 48 D. & C. 61 (Pa.).

The aforementioned cases recognized that the tax could be collected both from residents of Philadelphia, regardless of where they were employed, and from non-residents who perform services in Philadelphia.

In so doing, they were following the decision of your Honorable Court in SHAFFER v. CARTER, et al., 252 U. S. 37, 64 L. ed. 445, and TRAVIS, &c. v. YALE & TOWNE MFG. CO., 252 U. S. 60, 64 L. ed. 460.

If the petitioner were performing services in any portion of the City of Philadelphia he would be liable for the City income tax, under the aforementioned decisions; and if he failed to comply with the provisions of the City Income Tax Ordinance by not filing a return or paying the tax, he would be subject to the provisions of Section 9 of the said Ordinance, set forth fully on page 22 of the petitioner's brief, which is a penalty of \$100. and costs for each such offense or imprisonment for not more than 30 days for the non-payment of such penalty and costs within ten days from the imposition thereof.

The City of Philadelphia, in order to collect the penalty of \$100. for the failure of a taxpayer to file a return or pay the tax, could resort to a writ of *capias* under the provisions of the Act of July 12, 1842, P. L. 339, 12 P. S. 257.

Prior to 1842 a writ of *capias* could be issued in all civil actions.

12 STAND. PRACT., p. 428.

The Act of July 12, 1842, P. L. 339, 12 P. S. 257, abolished imprisonment for debt in all civil proceedings, "excepting in proceeding as for contempt, to enforce civil remedies, *action for fines or penalties*, or on promises to marry, on moneys collected by any public officer, or for any miscon-

duct of neglect in office, or in any professional employment, in which cases the remedies shall remain as heretofore: * * *." (Italics supplied.)

It will thus be seen that the Act of 1842 did not abolish imprisonment for debt in "actions for fines or penalties". Hence the City of Philadelphia was fully justified in issuing a *capias* for the collection of the penalties provided for in Section 9 of the Philadelphia Income Tax Ordinance. This is supported by the following authorities :

In 12 STAND. PA. PRAC., page 428, it is stated:

"There is, however, also authority for the commencement of such an action by *capias* or warrant of arrest."

On page 429 of the same Volume, it is stated:

"A practice arose very early of commencing proceedings for the violation of a municipal ordinance imposing a penalty by *capias* or warrant, and it seems always to have been the understanding that aldermen and justices of the peace might issue writs of *capias* in such cases."

In MILTON BORO. v. HOAGLAND, 3 Pa. C. C. Reps. 283, 285, the Court said:

"The practice in the City of Philadelphia is to commence such proceedings by *capias* or warrant of arrest, as appears by many of the reported cases."

In any event, since the highest Court of the State of Pennsylvania so decided this matter, it is binding upon your Honorable Court, as it involved purely a question of State procedure.

If a writ of *capias* would lie to collect the penalty of \$100. against the petitioner if he were performing services in any portion of the City of Philadelphia, it is difficult to understand why it could not be asserted against the petitioner when he performed services in League Island Navy Yard, since League Island Navy Yard has been held to be within the territorial limits of the State of Pennsylvania and the City of Philadelphia.

When Congress, in Section 2 of Public Act No. 819, not only took away from a person residing within a Federal area the right to resist an income tax, by reason of his receiving income for services performed in such area, but also granted to such taxing authority full jurisdiction and power not only to levy but also to *collect* such income tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area, then it is respectfully urged, that Philadelphia had the right to use the same remedies to collect the tax against non-residents employed in League Island Navy Yard as would be used against a non-resident working in any other portion of Philadelphia.

The method of collection recognized in the State of Pennsylvania is to issue a writ of *capias*. Hence, if a writ of *capias* lies against a non-resident working in Philadelphia, it would apply against a non-resident working in League Island Navy Yard after December 31, 1940; otherwise, the words "and collect such tax in any Federal area", appearing in Public Act 819, would be meaningless.

There is no merit in the contention advanced by the petitioner that since the Federal Government still has title to League Island Navy Yard Philadelphia could not denominate as an offense conduct committed in the Navy Yard and proceed to punish it.

It has already been demonstrated that League Island Navy Yard is within the territorial limits of Philadelphia.

The boundaries of Philadelphia run to the center of the river. The petitioner was performing services within the limits of the City of Philadelphia proper. He received compensation for such services. He was required to file a return with the Receiver of Taxes revealing the compensation so received and also to pay a tax thereon. He refused to do so. He was, therefore, liable for a penalty of \$100. under Section 9 of the Ordinance. The City of Philadelphia had a right to collect such a penalty by the issuance of a writ of *capias*.

If the petitioner's contention should prevail it would mean that a non-resident performing services within Philadelphia would never be subject to the penalty of \$100. for violations of the provisions of the ordinance, and Philadelphia could never recover such penalties by the issuance of a writ of *capias*; because there is no difference between a non-resident performing services in any portion of the City of Philadelphia and one who performs services in League Island Navy Yard, in view of the fact that Public Act 819 specifically provided that for the purpose of collecting income taxes such Federal area shall be considered "as though it was not a Federal area".

It is idle for the petitioner to contend that no municipal benefits were available to him. This contention was fully answered by the Supreme Court of Pennsylvania in the Kiker Case and your Honorable Court refused to disturb this decision. Therefore, there is no reason for interference at this time.

The non-residence of the petitioner is of no moment in this case as the mere privilege of earning money in a community by a non-resident is subject to a tax.

SHAFFER v. CARTER, 252 U. S. 37, 64 L. ed. 445;

SHAFFER v. HOWARD, 250 Fed. 873;

YERIAN v. TERRITORY OF HAWAII, 130 F.

(2d) 786 appearing on page 21 of the petitioner's brief.

Petitioner further argues that before Philadelphia could tax non-resident Federal employees, performing services in Federal areas, additional legislation was necessary since the Ordinance of December 13, 1939 can not apply to a situation created after December 31, 1940 by Public Act 819, as the City had no power to impose income taxes against non-residents earning compensation in League Island on December 13, 1939.

In advancing such a contention the petitioner overlooks the language of the Supreme Court of Pennsylvania in the case of *BLAUNER'S, INC. v. PHILADELPHIA*, 330 Pa. 342, 348, 198 A. 889:

"We think the same power is vested in the City of Philadelphia by the Sterling Act, *supra*, which authorizes it 'to levy, assess, and collect, or provide for the levying, assessment and collection' of taxes * * * Under such a broad legislative grant the City's power of collection is limited only by constitutional restriction."

In other words, the State of Pennsylvania delegated to the City of Philadelphia under the Sterling Act, August 5, 1932, P. L. 45, 53 P. S. 4613, in such fields of taxation where the State has not entered, the same broad powers possessed by the State. Consequently, if in 1939 the State had an income tax which did not at that time apply to non-resident Federal employees earning compensation at League Island, after January 1, 1941, the State would not have to adopt a special Act agreeing that it would accept the benefits of Public Act 819 before it would have the right to include within such income tax the compensation earned by a non-resident Federal employee at League Island.

This was squarely decided by the Superior Court of Pennsylvania in the case of *PHILADELPHIA v. SCHALLER*, 148 Pa. Super. Ct. 276, 282, 25 A. (2d) 406, 410, 317 U. S. 649, 87 L. ed. 522, where the Court said:

"When the disability of the state to tax federal incomes was removed, there was no need for a reenactment of the legislation to reach incomes formerly ex-

empt; the powers originally granted, broad enough to include all income regardless of the source, were sufficient for the purpose."

Since the Supreme Court of Pennsylvania refused an allocatur and this Court denied a writ of certiorari, it may be assumed that the language quoted hereinabove from the opinion of the Superior Court was approved by the State Supreme Court and this Court.

If this be true as regards the State of Pennsylvania, then it follows that it should be applicable to the powers of the City of Philadelphia granted to it by the State to impose income taxes. Hence, since the City's power of collection of income taxes is limited only by constitutional restrictions, and since the State legislature transferred all the taxing powers possessed by the State, then there would be no occasion for the City of Philadelphia to obtain consent from the State of Pennsylvania to include within its Income Tax Ordinance of 1939 the compensation earned by non-resident Federal employes at League Island.

In other words, Philadelphia stepped into the shoes of the State of Pennsylvania as regards the right and power to impose income taxes; and since Pennsylvania would not be required to adopt a new law imposing income taxes on non-residents working in the Navy Yard after January 1, 1941 if prior to that time it had a general income tax, it follows that the City of Philadelphia did not have to adopt a new ordinance.

In *YERIAN v. TERRITORY OF HAWAII*, 134 F. (2d) 786, the Act imposing the tax was enacted in 1933. The question involved was whether the Act applied to salary earned in December, 1939 by a non-resident employe of the Home Owners Loan Corporation. Nevertheless, the Court held that the provisions of the Act applied even though at the time it was enacted the salary of a Federal employee was exempt from taxation.

It must be borne in mind that the cession of League Island to the Federal Government by the State of Pennsylvania

was not a cession of absolute and perpetual jurisdiction. It was in effect a mere suspension of jurisdiction. *The State jurisdiction was not extinguished by the grant but merely suspended.* There was a reversion left in the State. This is so, because the purposes for which the grant was made were temporary. The right to exercise the jurisdiction granted was to be exclusive while it continued, but it was to be a mere temporary right.

RENNER v. BENNETT, 21 Ohio St. Rep. 431, 445.

Since the cession of jurisdiction merely amounted to a suspension thereof until the jurisdiction would be reverted to the State, it follows that when such reversion takes place that the law existing when the cession took place would apply when the reversion took place without any special legislation.

It is, therefore, respectfully suggested that in view of this question having been finally determined both in the Schaller and in the Kiker Cases, it should not be subject to review at this time.

Petitioner further argues that there is no express authority granted to the municipality by the Pennsylvania Legislature to tax persons working in League Island. No such express authority is necessary. The ordinance imposes a tax upon non-residents performing services in Philadelphia, and if League Island is within the territorial limits of Philadelphia then persons working in League Island are subject to the provisions of the ordinance.

The power to impose a tax authorized by City Council in 1939, as to non-residents employed in Federal reservations, was merely held in abeyance or suspended until such time as the jurisdiction would be restored to that territory. This jurisdiction was restored on January 1, 1941 by Congress; and it was so held both in the Schaller and Kiker Cases, as well as in other cases.

(3) Must a State accept a retrocession or relinquishment of jurisdiction from the Federal Government before it becomes valid?

It is respectfully submitted that when Congress, by Public Act 819, relinquished its exclusive jurisdiction in regard to income taxes and permitted a State or taxing authority to impose such taxes in Federal areas with the same force and effect as if there were never any Federal areas, it was conferring a benefit upon Philadelphia or any other taxing authority which had granted exclusive jurisdiction to the Federal Government.

Therefore, the acceptance of such limited jurisdiction and power is presumed in the absence of any dissent on the part of the State of Pennsylvania or the City of Philadelphia.

Public Act 819 has been in force since January 1, 1941, and the Legislature of the State of Pennsylvania has met on many occasions since that time and has not placed on record any dissent or dissatisfaction with the Act, which is the most conclusive evidence of the fact that it was satisfied with it.

Apart from the fact that it is presumed to have accepted the retrocession, it is respectfully submitted that it was not necessary for the State of Pennsylvania to affirmatively accept retrocession or relinquishment of jurisdiction from the Federal Government.

RENNER v. BENNETT, 21 Ohio St. Rep. 431 (1871).

This case was cited by the United States Supreme Court in **ARLINGTON HOTEL CO. v. FANT**, 278 U. S. 445, 455; 73 L. ed. 447, 452; by Circuit Judge Stone in the case of **WILLIAMS v. ARLINGTON HOTEL CO.**, 22 Fed. (2d) 669, 671; by Circuit Judge Taft in *In re THOMAS*, 82 Fed. Rep. 304, 308, and in **YELLOW CAB TRANSIT CO. v. JOHN-**

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PACIFIC RY. CO. v. McGLINN, 11

270, 271, where it was said:

"It is a general rule of pub recognized and

acted upon by the United Sta t whenever poli-

tical jurisdiction and legislativ r over any terri-

tory are transferred from one or sovereign to

another the municipal law of ntry, that is, laws

which are intended for the pro of private rights,

continue in force until abrogated or changed by the new government or sovereign."

In the case of *WILLIAMS v. ARLINGTON HOTEL CO.*, 22 F. (2d) 669, 671, Judge Stone said:

"The McGlinn case is direct authority for the contention made by plaintiff in error that the laws of the state in existence at the time of the cession continue upon the reservation where not inconsistent with the laws of the United States or where not abrogated by Congress after the cession."

In the case of *FORT LEAVENWORTH RAILWAY CO. v. LOWE*, 114 U. S. 525, 542, 29 L. ed. 264, 270, this Court said:

"It is necessarily temporary, to be exercised as long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used the jurisdiction reverts to the state."

In the instant case the cession of exclusive jurisdiction over League Island was made on this condition:

"Providing, however, that the cession * * * made shall continue in force as long as the * * * territory shall be used by the Government of the United States for the purpose of a navy yard, and *no longer*." (*Italics supplied.*)

It may be inquired what would happen if the Government ceased to use League Island for the purposes of a Navy Yard. Under the Act of cession, the Federal Government would cease to have exclusive jurisdiction thereof.

Suppose Pennsylvania never formally accepted jurisdiction over League Island, or, as was done in the Ohio case, suppose Pennsylvania refuses to accept jurisdiction over League Island? Would jurisdiction over League Island then be suspended like Mohammed's coffin so that neither the Federal Government nor the State of Pennsylvania would have any jurisdiction thereof? Such a situation is unthinkable. And yet, if a recession or surrender of jurisdiction by

the Federal Government must be formally accepted by the State, then such an absurd result would follow.

If jurisdiction over League Island would immediately vest in the State of Pennsylvania when the Government ceased to use League Island as a Navy Yard, regardless of whether Pennsylvania would formally accept such jurisdiction, the same result would follow when Congress voluntarily surrenders or yields a portion of its original jurisdiction to the State.

In the dissenting opinion in the Kiker case it is pointed out that since Congress had to formally accept exclusive jurisdiction, it follows that the State must formally accept a recession of said jurisdiction. The writer of the dissenting opinion, however, overlooks the fact that the reason for the necessity of formal acceptance by Congress was because in the Act of cession it was stated that such exclusive jurisdiction shall only become effective after title to the land shall be *accepted by Congress*; but nowhere is it stated that a recession of such jurisdiction shall not become effective until formally accepted by the State of Pennsylvania.

Since the jurisdiction that was granted to the Federal Government over League Island was necessarily temporary in the sense that it terminated when League Island was no longer used as a Navy Yard, the thought expressed by the Supreme Court of Ohio that the State jurisdiction over such ceded territory has been temporarily suspended applies; and if such jurisdiction has only been temporarily suspended then no logical reason appears why Congress cannot return a portion of said jurisdiction to the ceding State without the necessity of the formal acceptance of the same by the State.

The most recent expression on the subject by this Court is *S. R. A. v. MINNESOTA*, 66 S. Ct. 749, 753, 90 L. ed. 663, where this Court said:

"The acceptance by the United States at that time of the power ceded is presumed."

If the acceptance of cession is presumed, then why should not the acceptance of a retrocession of exclusive sovereignty

be presumed? This Court further held in the last cited case:

"In this instance there were no specific words in the contract with petitioner which were intended to retain sovereignty in the United States. There was no express retrocession by Congress to Minnesota, such as sometimes occurs. There was no requirement in the act of cession for return of sovereignty to the state when the ceded territory was no longer used for federal purposes. In the absence of some such provisions, a transfer of property held by the United States under state cessions pursuant to Article I, §8, Clause 17, of the Constitution would leave numerous isolated islands of federal jurisdiction, unless the unrestricted transfer of the property to private hands is thought without more to re-vest sovereignty in the states. As the purpose of Clause 17 was to give control over the sites of governmental operations to the United States, when such control was deemed essential for federal activities, it would seem that the sovereignty of the United States would end with the reason for its existence and the disposition of the property. We shall treat this case as though the Government's unrestricted transfer of property to non-federal hands is a relinquishment of the exclusive legislative power. Recognition has been given to this result as a rule of necessity. *If such a step is necessary, Minnesota showed its acceptance of a supposed retrocession by its levy of a tax on the property.*" (Italics supplied.)

The language just quoted indicates very clearly that it was not necessary on the part of the State of Pennsylvania or the City of Philadelphia to affirmatively accept the retrocession of jurisdiction to levy and collect income taxes within Federal areas. Therefore, when Philadelphia imposed the provisions of the City Income Tax Ordinance against compensation of non-resident Federal employees performing services in Federal areas, it had the same effect

as if a separate Ordinance had been adopted in 1941 imposing such taxes specifically against such employes.

The City of Philadelphia, therefore, respectfully suggests to your Honorable Court that there appear no substantial reasons why the opinion of the Superior Court of Pennsylvania should be reviewed by this Court.

Respectfully submitted,

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